MAY 15 2002

No. 01-1245

In The Supreme Court of the United States

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,

Petitioners,

vs.

RICHARD LEO DEORLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1) Whether a peace officer, while confronting an unarmed mentally disturbed man who is wearing nothing but shorts and who has been partially compliant with police commands, is acting objectively reasonable when the officer shoots the man at a distance of over 30 feet with a shotgun propelled cloth bag loaded with buckshot where the man has not committed a serious crime and does not present a flight risk.

2) Whether a peace officer who unnecessarily shoots an unarmed man who is more than 30 feet away in order to take the man into custody for a minor crime is entitled to qualified immunity.

3) Whether prior to using force likely to produce great bodily injury or death, a peace officer should provide a warning.

4) Each time a police force acquires a new weapon or device, is it entitled to use such weapon or device without regard to existing law until a case is decided for that specific weapon or device.

5) May a police officer who claims to be confused by the state of existing law find a safe harbor from liability by claiming a "reasonable mistake as to the legality of his actions" where his actions caused great bodily injury to an unarmed man.

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STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On September 9, 1996, Plaintiff Richard Leo Deorle, a resident of Paradise, Butte County, California, became highly agitated and emotionally unstable due to a drug reaction to Interferon used to treat Hepatitis C, a prescribed medication. (ER-103). Because of his instability exhibited by hostile words and aggression against the physical interior of his residence, his wife called 911. Upon the arrival of an officer at the residence, Richard Deorle's wife and children left the residence in the custody of a police officer. (ER-103). During the removal of Mr. Deorle's wife and two children from the residence, Richard Deorle had picked up a board which came off of a porch railing but when told to put the board down by the officer, Mr. Deorle complied. (ER-40; ER-124). Due to the highly agitated state of Mr. Deorle, the responding officer called for backup. At that point in time, through various channels in the police organization, a Special Incident Response Team (SIRT) was called up to handle the incident. (ER-40; ER-168).

Mrs. Deorle testified, at that point in time, she did not feel in any danger personally nor did she believe any danger existed to her children. (ER-119). She, however, felt it prudent to call the 911 emergency number to get help for her agitated husband. (ER-119).

Prior to the incident, Defendant Greg Rutherford, a deputy with the Butte County Sheriff's Department, had received training in the use and deployment of a steel shot filled cloth bag shotgun propelled ammunition manufactured by Defense Technology Inc. During his pre-incident training, Defendant Rutherford observed that the Defense

Technology Inc.'s rounds, when fired at a target, would miss the target entirely on occasion because they would fly or veer off target. (ER-105; ER-159). Prior to the incident, Defendant Rutherford had never deployed the shot filled bag round in the field but had only deployed it in training.

Upon arrival at the scene, Defendant Greg Rutherford loaded his "less lethal" round of ammunition into his 12-gauge shotgun. (ER-140). Defendant Rutherford received no instructions from a scene commander about standards for deployment of the "less lethal" round. No one at the scene or elsewhere made a proposal or communicated to Defendant Rutherford any tactics or plans that were going to be implemented to deal with the Plaintiff Deorle. (ER-143). Defendant Rutherford did not know whether any negotiators were on scene when he arrived, nor did he know whether any of the negotiators had been called to the scene. (ER-144). Negotiators were, in fact, present at the scene, however, were not employed to facilitate a peaceful resolution to the incident. (ER-40; ER-179).

Defendant Rutherford acknowledged that a "less lethal" round shot to the face of a subject constituted deadly force. (ER-158). Defendant Rutherford admitted that the condition of the Plaintiff at the time of the shooting of the "less lethal" round at Plaintiff did not justify the use of deadly force. (ER-138). Several officers at the scene described the Plaintiff as walking toward Defendant Rutherford at the time he was shot. Defendant Rutherford himself described Plaintiff as "walking towards me." (ER-148). All of the parties agree that Defendant Rutherford discharged his 12-gauge shotgun directly at the Plaintiff at a distance of 30 feet or more. (ER-103). It is also undisputed that the "less lethal" missile fired from the shotgun struck the Plaintiff in the left eye embedding

itself in the orbit of the eye resulting in a complete destruction of the eye as well as fractures of the orbit and the spilling of buckshot, which is contained within the bag itself, into the eye and sinus cavities where they remain to this day. (ER-52).

At the time of the shooting of the Plaintiff by Defendant Rutherford, the Plaintiff had in his hand a can of charcoal lighter fluid. Defendant Rutherford did not consider the lighter fluid to be a deadly weapon. (ER-151). No evidence exists that Deorle had any means of lighting the fluid or whether there was fluid in the can. Most significantly, due to the absence of communication between officers at the scene and Defendant Rutherford, who arrived late, Rutherford was unaware of the nature of the board and roofing hammer events. Rutherford saw only the cross-bow, and the only action Deorle conducted with it was to discard it. Rutherford admitted that he did not see Plaintiff assault anyone. (ER-156).

Rutherford did not testify that his conduct was defensive or forced him to act quickly to protect himself. In fact, Rutherford stated he shot Deorle because Deorle had passed a point at which Rutherford decided to fire. (ER-103). At the time that Rutherford fired the projectile at Deorle, Rutherford was standing next to a tree, using it as a prop, and had two armed police officers on each of his flanks. (ER-148; ER-41).

At the time of the shooting, the Defendant Rutherford was not in communication with any person concerning the status of the incident or the protocol that was to be administered. Butte County Sheriff's Department had no written policy in effect on the use of the 12-gauge beanbag round, and there was no policy on how, when, who or what

training was required for the use of the weapon, and the weapon had never been deployed in the field previously. (ER-88-95). Plaintiff's expert, Peter A. Reedy, a 24-year member of the Sacramento Police Department, 20 years as a Sergeant, filed a Declaration in opposition to the motion for summary judgment, and stated in part: "The effective resolution of a Critical Incident can often be traced back to successful or unsuccessful communications; communication between the police and the subject, and also communication between the police themselves, relatives, neighbors, co-workers, media and other community and police resources. The police report on the subject incident reflects that Sergeant Johnson requested Deputy Rutherford to come to the scene with his "less lethal" capable shotgun. However, the reports reflect no communication directing Rutherford to approach Deorle and shoot him. If there was no communication regarding this incident on the part of Deputy Rutherford, then he (an assistant team leader of the SIRT Unit) was acting independent of the SIRT Unit and was acting on his own. If there was some type of communication between Rutherford and the Incident Commander Estes, it was not part of any plan and it was not communicated to all units on the scene. The lack of communication is demonstrated by Deputy Doug Smith leaving an important position on the perimeter. In addition, one of the SIRT officers had staged his men 7/10ths of a mile from the scene with knowledge that Lieutenant Estes was handling the incident and had no experience or training in Critical Incident Management. Lieutenant Smith thereby nullified his ability to communicate with Lieutenant Estes and provide his training and experience to an effective handling of the situation. It appears that there was no communication between officers

at one intersection with another group of officers at the opposite intersection."

In Paragraph "j" of his Declaration, Expert Reedy stated:

> "The use of the shotgun, beanbag round, was an unreasonable use of force upon the person of Richard Deorle and resulted in the loss of his left eye. The Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force. The beanbag round is described as a 'long range impact weapon.' It would be unreasonable for an officer to use an impact weapon on an unarmed person. The unreasonableness of this act is magnified by the facts that: (i) the distance between the shooter and the unarmed person was more than 30 feet away; (ii) there were no immediate threats to anyone; (iii) the shotgun was used by an independently operating SIRT deputy; all part of no organized 'force.' An impact weapon can be used in self defense, in defense of others and to ward off an attack. The use of the 12-gauge beanbag round in this incident was an unreasonable deployment of force. The use of a hand baton would not have been allowed in this case." (ER-88-95).

In a study contained in the Journal of the International Wound Ballistics Association, Volume 4, Fall 2000, Number 4, Wound Ballistics Review, it reports that:

> "The head and neck are vulnerable to fatal blunt trauma from any configuration beanbag impact, and the need to avoid impacts in these areas is well known. Impacts in the head and neck should always be unintended and while the need to avoid these impacts is a factor in user tactics and training, these impacts are not bean

> bag configuration discriminators. All vulnerable body areas that should also be unintended targets but those that dominate fatal wound trauma risk are sensitive to beanbag configuration and have occurred more often."

After 768 deployments of bean bag rounds, the Wound Ballistic Review reported 8 fatalities, 14 penetrations and 27 fractures. *Id.* At page 11. The reported conclusion included the statement: "Second, *in the current sample*, fatal injuries are far more likely when projectiles strike the neck and chest as compared to other areas; 16.7% of the projectiles striking citizens in the neck and 3.4% of those striking the chest produced fatal wounds, while 0% of those striking other areas did." *Id.* at page 13.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

I

The Acquisition Of Weapons By Police That Maim And Occasionally Kill Does Not Require A Change In The Well-Settled Rule That Unreasonably Applied Excessive Force Disqualifies An Officer From Qualified Immunity.

The Ninth Circuit observed in Appendix to Petition for Writ of Certiorari, page 53, footnote 13: "The appellees also called the cloth-cased shot a 'beanbag' round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of 'hackey-sack.' It is a projectile capable of inflicting serious injury or death, rather than some children's toy."

Taking into consideration the fact that the beanbag round is fired from a 12-gauge shotgun, propelled by an

explosion of gun powder, it seems, both through reported testing and actual practice experience of Deputy Rutherford, to follow a course of its own, and makes for a very dangerous and all to often deadly weapon. The repetition of the mantra contained in the Petition for Writ of Certiorari by the Petitioners using the phrase "non-deadly force" and on a "dangerous individual" certainly mischaracterizes the scene and the implements applied in this case. In fact, even when the round was fired into Deorle's eye socket, several officers reported hearing someone shouting identifying the round that had been fired as "less lethal." It is only in the appellate environment that creative counsel have transformed a dangerous, potentially deadly device into a "non-lethal" weapon.

How was it that prior to Deputy Rutherford's arrival, no other deputies had applied any force to Deorle? They had observed reluctant compliance with their commands and recognized Deorle as in a mental crisis and a danger only to himself. As this Court stated in *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694 (1985):

> "This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparent unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."
>
> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable". . . . "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at page 1701.

Petitioners contend that the Ninth Circuit misapplied or ignored the *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151 (2001) decision and *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865 (1989). Such is not the case in that the appellate panel cited *Saucier v. Katz* and proceeded under the *Katz* analysis. In the concluding paragraph of the *Saucier v. Katz* opinion, this Court stated: "Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings."

The Ninth Circuit panel, in its summary of its application of the *Katz* test stated:

> "Here, the test is not simply a reiteration of the *Graham* test which we applied above: rather, we must determine whether, in using excessive force, the officer made a 'reasonable mistake as to the legality of his actions.' *Katz,* 121 S.Ct. at 2158. We assume, *arguendo*, that Rutherford thought the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' *Id.* at 2156. The Court also explained the purpose of the rule: 'Qualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force.' *Id.* at page 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It

should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who has committed no serious offense, is mentally or emotionally disturbed, and has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity. Notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See DeBoer v. Pennington,* 206 F.3d 857, 864-865 (9th Cir. 2000). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When 'the defendant's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' *DeBoer,* 206 F.3d at 864-865. This is such

> a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the 'less lethal' lead-filled beanbag round was appropriate or lawful. To the contrary, 'it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful.' *Katz,* 121 S.Ct. at 2158. Given all the circumstances, the error in judgment, such as it was, does not constitute a 'reasonable mistake' of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force."

II

Use Of Deadly Force On An Unarmed Man Who Has Committed No Serious Crime, Who Poses No Immediate Threat To Officers Or Others And Who Is Passively Resisting Arrest, Is Manifestly Unreasonable.

This issue is discussed in Paragraph I above.

III

Courts Must, In Motion For Summary Judgment, Look To The Objective Evidence And Not Be Influenced By An Officer's Expression Of An Intent Other Than That Manifested By The Physical Evidence.

In *Graham v. Connor* 490 U.S. 386, 109 S.Ct. 1865 (1989), this Court held:

> "Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application' . . . however,

its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. . . . "

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20-20 vision of hindsight."

"An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 1872

IV

The Petitioners' Claim Of The Ninth Circuit's *Deorle* Decision Being Out of Line With Other Circuits Lacks Substance.

In a deadly force case, the Third Circuit ruled that:

"[I]n evaluating the objective reasonableness of the use of force, the Court is not limited to consideration of the precise moment of the shooting. The Court disagreed with decisions that exclude any evidence of events preceding the use of force. Such a rigid rule is inconsistent with the Supreme Court's direction that Courts consider the totality of the circumstances. A totality of the circumstances approach cannot automatically exclude 'all context and causes prior to the moment the seizure is finally accomplished. . . . How is the reasonableness of a bullet striking

someone to be assessed if not by examining preceding events?' In the instant case, all events that transpired during the officer's pursuit of the deceased were relevant. The Court stressed that not all events preceding the shooting will always be relevant; some may have too attenuated a connection to the use of force under ordinary concepts of causation. The Circuit Court also expressed agreement with the Ninth Circuit that Courts should be cautious about granting summary judgment to the officer in deadly force cases, because the only witness most likely to contradict the officer's version is now deceased. (*Scott v. Henrich,* 39 F.3d 912 (9th Cir. 1994))." *Abraham v. Raso,* 183 F.3d 279, 291-292 (3rd Cir. 1999).

The Fourth Circuit held that:

"It was clearly established in 1995 that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone. Release of a police dog into a home works a seizure, even when the dog bites an individual who turns out to be a nonsuspect. 'By giving the command "find him", Officer Sims intended the dog to find anyone in the house' and bite that person. There was a factual dispute about whether the officer gave a warning before sending the police dog into the house. The fact that Plaintiffs claimed that they 'heard no such warning' was enough for Plaintiffs to survive summary judgment on the issue of whether a warning was given. 'A juror could reasonably conclude that if certain witnesses did not hear a warning then no warning was given even if other witnesses testified to a warning.'" *Vathekan v.*

Prince George's County, 154 F.3d 173, 175-180 (4th Cir. 1998).

In *Gutierrez v. San Antonio,* 139 F.3d 441, 446-447 (5th Cir. 1998), the Complaint alleged that the decedent died after being "hog-tied" by the police. The Fifth Circuit found that disputed material issues of fact precluded determination on summary judgment of whether the police officers acted in an objectively reasonable manner. The Court observed that since the Supreme Court's decision in *Tennessee v. Garner*, lower courts have "struggled with whether to characterize various police tools and instruments as 'deadly force'. . . . Courts have generally described 'deadly force' as force carrying with it substantial risk of 'causing death or serious bodily harm.'" There were material issues of fact concerning whether "hog-tying" the deceased constituted the use of deadly force and whether the use of deadly force was objectively reasonable. The mere fact that the Defendants produced an expert opinion that their actions were reasonable did not mean that they were entitled to summary judgment. "An expert's opinion does not establish reasonableness as a matter of law, especially when directly contradicted by another expert's well-supported opinion."

Under California Penal Code Section 12001(b):

> "As used in this title, 'firearm' means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion."

Rutherford failed to warn Deorle prior to shooting him. Petitioners argue that the Petition should be granted because the Ninth Circuit decision is not aligned with

other Circuits. The giving of a warning is not a new or novel idea in light of *Abraham v. Raso, supra.*

CONCLUSION

The officer's intent to aim at a different part of Deorle's body is of no consequence here in view of the fact that the reality is that he shot Deorle in the head and, by his own admission, Officer Rutherford considered such a head shot to be the use of deadly force. Deorle was not an immediate threat to anybody at the time he was shot, and the application of deadly force to his person would be manifestly unreasonable. Rutherford was not, under any test by this Court, entitled to qualified immunity. Whether Rutherford aimed at the head of Deorle, or acted recklessly by shooting a device that had proved unreliable in trials, or intended to fire at Deorle's abdomen; are all questions of fact for a jury.

Nor have the Petitioners been able to cite any cases that differ in any of the Districts. The compliance of the Districts with the Supreme Court's mandate for the application of deadly force to an unarmed nondangerous person, is uniform. It is only by characterizing Deorle as a dangerous, threatening individual and characterizing the weapon used on Deorle as "non-deadly" that Petitioners can seriously contend for the attention of this Court. Since no one but counsel for the Petitioners has characterized the weapon used in this case as "non-deadly", the invention of counsel should not be permitted as a means for a hearing before this Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May, 2002

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